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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. WILLIE CHURCHWELL, Appellant.	)	2 CA-CR 2010-0057 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20082363

Honorable Teresa Godoy, Judge Pro Tempore
Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

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K E L L Y, Judge.

¶1 Willie Churchwell appeals his conviction for sexual conduct with a minor under fifteen. He argues the trial court erred in allowing a break in jury deliberations

rather than granting a mistrial, in precluding evidence of the victim's prior sexual conduct, and by preventing him from presenting a complete defense. Churchwell also claims the prosecutor made multiple improper comments during opening and closing arguments, constituting misconduct. Finding no error, we affirm.

Background

¶2 "We view the facts and reasonable inferences therefrom in the light most favorable to sustaining the verdicts." *State v. Herrera*, 203 Ariz. 131, ¶ 2, 51 P.3d 353, 355 (App. 2002). The victim, C., and her mother, Mollie, live in Willcox, Arizona. Willie Churchwell is C.'s step-grandfather, married to C.'s maternal grandmother, Sue. Before the charged sexual conduct occurred, C. sometimes spent the night alone with Sue and Churchwell at the home they shared in Tucson. On those visits, C. typically slept in the same bed as Sue and Churchwell.

¶3 At trial, C. testified that, during one such visit in 2007, Churchwell "opened [her] mouth with his hands" and placed his penis in her mouth. In 2007, C. was six years old. After the incident, C. told a family friend, Marcia, "what [her] Grandpa Will did to [her]." Marcia then told C. she "needed to have this conversation with her mother." C. thereafter told Mollie what had happened and Mollie "immediately called the police." Subsequently, C. was taken for a forensic interview at the Children's Advocacy Center in Tucson, and a confrontation call was arranged between Mollie and Churchwell.

¶4 Churchwell was charged with five counts of sexual conduct with a minor under fifteen in violation of A.R.S. § 13-1405. The state subsequently dismissed the first

four counts of the indictment. The remaining count concerned the incident that had occurred at Churchwell's home. The first trial ended in a mistrial after the jury was unable to reach a verdict. In the second trial, the jury found Churchwell guilty on the single remaining count. Churchwell moved for a new trial on the grounds that the trial violated his due process rights, and the trial court denied the motion. The court then sentenced Churchwell to a term of life imprisonment without the possibility of parole for thirty-five years. This appeal followed.

Discussion

I. Break in jury deliberations

¶5 Churchwell first argues the trial court abused its discretion and committed structural, prejudicial error by denying his motions for mistrial and new trial based on an eleven-day break in the jury's deliberations.[1] "Structural error 'deprive[s] defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence,'" and mandates reversal. *State v. Valverde*, 220 Ariz. 582, ¶ 10, 208 P.3d 233, 235 (2009), *quoting State v. Ring*, 204 Ariz. 534, ¶ 45, 65 P.3d 915, 933 (2003). There are only limited circumstances where an "error infect[s] the 'entire trial process' from beginning to end" and qualifies as structural

[1]Churchwell asserts that the break in deliberations was twelve days. But he appears to be including the first day of deliberations in his computations. The jury deliberated December 18 and then separated, resuming deliberations on December 30. Hence, the jury was separated for eleven days.

error. *Ring*, 204 Ariz. 534, ¶ 46, 65 P.3d at 933-34, *quoting Neder v. United States*, 527 U.S. 1, 8-9 (1999) (internal quotation omitted in *Ring*).

¶6 Despite Churchwell's suggestion otherwise, an eleven-day break in trial proceedings is not unfair as a matter of law and does not constitute structural error. *See State v. Johnson*, 122 Ariz. 260, 270, 594 P.2d 514, 524 (1979) (ten-day recess for juror vacation not abuse of discretion, where testimony read to jury when requested);[2] *Hamilton v. Vasquez*, 17 F.3d 1149, 1159 (9th Cir. 1994) (eighteen-day recess did not violate due process); *Johnson v. People*, 384 P.2d 454, 459 (Colo. 1963) (although "highly undesirable" thirty-three-day postponement during trial not prejudicial); *State v. Kanae*, 970 P.2d 506, 511 (Haw. App. 1998) (seventeen-day recess permissible).

¶7 But, relying primarily on *United States v. Hay*, 122 F.3d 1233 (9th Cir. 1997), and *People v. Santamaria*, 280 Cal. Rptr. 43 (Ct. App. 1991), Churchwell argues the length of the jury separation resulted in proceedings that "inherently lack[ed] . . . due process." As the state argues, however, *Hay* and *Santamaria* are distinguishable because the reviewing courts in those cases found the recesses to be "unnecessary." In *Hay*, the recess was significantly longer than the one at issue here, an alternate juror was available, and both parties had stipulated to proceeding with eleven jurors. 122 F.3d at 1235. In *Santamaria*, the delay during deliberations resulted from the fact "that the judge was to

[2]Churchwell attempts to distinguish *State v. Johnson* because the trial court here did not "offer" to refresh the jurors' memories. 122 Ariz. at 260, 594 P.2d at 514. In *Johnson*, however, the jurors specifically requested information to refresh their memories after a pre-deliberations ten-day break. *Id.* at 270, 594 P.2d at 524 ("testimony in which the jury was interested was read to it"). In contrast, there is no indication that the jurors here requested any additional information after they resumed deliberations.

be 'away'" even though a substitute judge could have presided in the primary judge's absence. 280 Cal. Rptr. at 47-48.

¶8 Churchwell also contends the trial court violated his right "to a fair and impartial jury" because the extended recess exposed the jury to potential contamination.[3] Although we agree with Churchwell "there may be some lengths of separation that involve such a probability that prejudice will result" as to inherently violate due process, we do not find that situation here. A trial court has broad discretion to determine whether a jury may separate after deliberations begin. Ariz. R. Crim. P. 22.1(b) ("[t]he court may in its discretion permit the jurors to disperse after their deliberations have commenced"). We therefore review the trial court's decision for an abuse of discretion. *See State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995) (decision to sequester or separate jury not disturbed "absent a showing of an abuse of discretion and resulting prejudice to the defendant"); *State v. Jeffrey*, 203 Ariz. 111, ¶ 17, 50 P.3d 861, 865 (App. 2002) (motions for mistrial and new trial reviewed for clear abuse of discretion).

> [T]he granting of a mistrial is an extreme remedy, it may and should be declared only as a result of some occurrence . . . of such a character that it is apparent to the court that because of it one of the parties cannot have a fair trial, or where further proceedings would be productive of great hardship or manifest injustice.

State v. Chaney, 5 Ariz. App. 530, 535, 428 P.2d 1004, 1009 (1967), *quoting* 88 C.J.S. *Trial* § 36(b) (1955). Likewise, "motions for new trial are disfavored and should be

[3]The state contends Churchwell waived his constitutional arguments by not raising them until his motion for new trial. But because structural error mandates reversal even in the absence of an objection below, we will address the claims. *Valverde*, 220 Ariz. 582, ¶ 10, 208 P.3d at 235-36.

granted with great caution." *State v. Hansen*, 156 Ariz. 291, 295, 751 P.2d 951, 955 (1988). Because the trial court "'can better assess the impact of what occurs before [it],'" we give wide deference to the trial court's determination "of conflicting procedural, factual or equitable considerations." *State v. Winegar*, 147 Ariz. 440, 445, 711 P.2d 579, 584 (1985), *quoting State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983).

¶9 This case was tried before a twelve-person jury, without an alternate juror.[4] On the first day of trial, December 15, the trial court and counsel agreed that deliberations would likely begin on Friday, December 18. The court informed the prospective jurors during voir dire that "[t]he trial is expected to last . . . through no later than Friday[, December 18]." As expected, the case was submitted to the jury on December 18, and the jury began deliberations at 12:20 p.m.

¶10 When the jury had not returned a verdict by 6:10 p.m., the trial court stated it intended to allow the jury to break for the weekend at 6:30 p.m. At 6:39 p.m., the court stated "all [jurors] have indicated that they are not available next week, given the holiday,"[5] but they had agreed to resume deliberations on December 30. The jury was

[4]Although an extra juror was seated so that an alternate juror would be available if needed, after jury selection a juror was dismissed for cause based upon financial hardship.

[5]At the end of the day on Friday, one juror told the court he had a business trip to Los Angeles from which he could not return until December 29, and others apparently had conflicts due to the holidays.

released and returned at 10:00 a.m. on December 30 to resume deliberations, reaching a verdict at 11:28 a.m.

¶11 Before the delay in deliberations occurred, the jury already had been deliberating for six hours. In addition, the length of the delay was governed largely by the holiday season where the jurors had other commitments. In light of these circumstances, we cannot say the court abused its discretion in determining the better course of action was to reconvene after the holiday break, rather than order a mistrial. *See Chaney*, 5 Ariz. App. at 535, 428 P.2d at 1009 (mistrial an extreme remedy).

¶12 Churchwell speculates there were many ways he might have been prejudiced by the delay, including that the jury may have been exposed to outside influences over the break and their memories might have faded. He contends the break prejudiced him because "the jurors did not have the testimony and arguments fresh in their minds." We point out, however, that in Arizona jurors are allowed to take notes during trial, and the court indicated it would provide assistance to refresh the jurors' memories if they needed it. Ariz. R. Crim. P. 18.6(d) and 22.2(c).

¶13 And Churchwell has not shown that any juror was "exposed to improper outside influences."[6] The mere fact that some jurors who had been "inclined to vote not guilty . . . on December 18" voted guilty when the jury reconvened does not alone

[6]Churchwell did ask the court to inquire whether the jury had been exposed to improper influences while at recess. The court denied this request saying, "I think that they know that if they've seen something or they've heard something, that they are to let us know, and I'm going to trust that they follow the instructions . . . ." Because the trial court is in the best position to make this determination, we find no error. *See Winegar*, 147 Ariz. at 445, 711 P.2d at 584.

indicate improper influence. Churchwell argues that because the trial court committed structural error he is not required to show actual prejudice. But, as we explained above, the delay did not constitute structural error, thus prejudice cannot be presumed. Because Churchwell has offered only speculation he could have been prejudiced by the delay in deliberations, we conclude the court did not abuse its discretion in denying Churchwell's motions.

¶14 Churchwell also argues that, even if a break in deliberations was not unfair per se, the trial court erred in failing to re-admonish the jury before they separated. The court's failure to re-admonish, he asserts, violated Rule 22.1, Ariz. R. Crim. P., which provides the court may permit the jury to separate "instructing them when to reassemble and giving the admonitions of Rule 19.4[, Ariz. R. Crim. P.,]" and increased the likelihood of improper influence of the jury. Again, Churchwell has failed to show that any juror misconduct occurred, or that jurors were indeed exposed to outside influences. Although Churchwell is correct that the court did not specifically re-admonish the jury before it separated for the holiday, it had already admonished the jury several times, including at the start of the proceedings. And immediately prior to deliberations, the court instructed the jury "the only time that you can deliberate is when all 12 of you are present in the room and participating in deliberations." The admonition also appeared in the jurors' handbooks, which were in their possession during deliberations. Ariz. R. Crim. P. 18.6(a) and 22.2. And, during final instructions, the court told the jurors not to "surrender your honest convictions as to the weight or the effect of the evidence solely

because of the opinion of the other jurors, or the mere purpose of returning a verdict." We assume juries follow their instructions. *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996).

¶15 The court's failure to re-admonish the jury, in light of the several times the jury was properly admonished and instructed, cannot be characterized as an abuse of discretion, much less as structural error. *See Ring*, 204 Ariz. 534, ¶ 46, 65 P.3d at 933-34 (noting Supreme Court has defined relatively few instances of structural error, including biased trial judge and denial of criminal defense counsel). And, because we can say beyond a reasonable doubt that the court's failure to re-admonish the jury prior to separation did not affect the verdict, any error is harmless. *See State v. Jackson*, 144 Ariz. 53, 55, 695 P.2d 742, 744 (1985) (trial court's failure to reinstruct on burden of proof before deliberations was harmless error); *Valverde*, 220 Ariz. 582, ¶ 11, 208 P.3d at 236.

II. Preclusion of evidence related to the victim's prior sexual conduct

¶16 Churchwell also argues his conviction should be reversed because the trial court erred in precluding him from questioning C. regarding alleged prior sexual conduct.[7] We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *State v. Daniel*, 169 Ariz. 73, 74, 817 P.2d 18, 19 (App. 1991).

[7]Citing *State v. Moreno-Medrano*, 218 Ariz. 349, 185 P.3d 135 (App. 2008), the state argues that Churchwell forfeited this claim through lack of sufficient argument. Churchwell has, however, complied with Rule 31.13, Ariz. R. Crim. P., and presented his argument, supported by authority and citations to the record, such that we cannot say he

¶17 Here, the trial court found there was no "clear and convincing evidence that the child has previously been exposed to a sexual act." Churchwell argues the state "agreed that prior sexual conduct had occurred" and the court erred in not determining, under Rule 403, Ariz. R. Evid., whether the evidence's probative value was outweighed by the danger of unfair prejudice, using the two part test adopted in *State v. Oliver*, 158 Ariz. 22, 760 P.2d 1071 (1988). We disagree.

¶18 Churchwell asserts *Oliver* governs the admissibility of "an alleged victim's prior sexual experience or knowledge." This is an incorrect statement of the law. Although *Oliver* discussed the applicability of the rape-shield law in effect at the time, it was decided ten years before our legislature adopted Arizona's current rape-shield law, A.R.S. § 13-1421. *See* 1998 Ariz. Sess. Laws, ch. 281, § 4; *Oliver*, 158 Ariz. at 26, 760 P.2d at 1075. Section 13-1421 applies to prosecution for all sexual offenses enumerated in Chapter 14 of the Arizona Criminal Code, including a violation of A.R.S. § 13-1405, and states that "[e]vidence of specific instances of the victim's prior sexual conduct may be admitted only" if certain conditions are met. *See State v. Gilfillan*, 196 Ariz. 396, ¶ 16, 998 P.2d 1069, 1074 (App. 2000); *State v. Herrera*, 226 Ariz. 59, ¶ 30, 243 P.3d 1041, 1050 (App. 2010). Section 13-1421(B) provides that the "standard for admissibility of [such] evidence . . . is by clear and convincing evidence."

¶19 To the extent Churchwell argues the trial court was not required to find "clear and convincing evidence" of the alleged prior sexual conduct because the state

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has waived this claim. *See State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989).

conceded the conduct in question, we disagree. *See* § 13-1421(B). At a hearing on the state's motion to preclude this evidence, the state informed the court that Mollie had described incidents where C., with her pants removed, had been found with male children. But Mollie did not believe any physical contact had occurred between the children. Mollie denied that she had told the defendant's wife Sue that the incidents involved five- and eight-year-old boys licking C. In finding there was not "clear and convincing evidence" the alleged prior sexual conduct had occurred, the court applied the proper standard and we have no basis to conclude it abused its discretion in precluding the evidence.[8]

III. Right to present a defense

¶20 Churchwell next argues the trial court violated his "constitutional right to present a defense." Specifically, he claims the court erred in precluding him from presenting evidence of third-party culpability, details of a dispute between Mollie and Sue, and "his state of mind and demeanor" during the confrontation call. "'[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.'" *State v. Machado*, 224 Ariz. 343, ¶ 12, 230 P.3d 1158, 1166 (App. 2010), *quoting Crane v. Kentucky*, 473 U.S. 683, 690 (1986). Although "'[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense,'" *id.*,

[8]Even if the court had found clear and convincing evidence the alleged events had occurred, their admissibility still would have been subject to the requirements of § 13-1421. Specifically the evidence must fall under one of the five exceptions enumerated in § 13-1421(A), and the court must find the evidence is material and relevant and its probative value not outweighed by the danger of unfair prejudice. § 13-1421(A); *see Herrera*, 226 Ariz. 59, ¶ 30, 243 P.3d at 1050.

quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973), evidence presented by the defendant must comply with the established rules of evidence, *id.* ¶ 13. In applying the rules of evidence a court is "guided not only by the express terms of the pertinent rules . . . , but . . . by the core principles of relevance and reliability that underlie them." *Id.*

a. Preclusion of third-party-culpability evidence

¶21 Churchwell sought to introduce evidence that the victim had been in the presence of an individual reputed to be a child molester, inferring that this individual, rather than Churchwell, engaged in sexual conduct with C. The "evidence" consisted of statements by Sue that twenty-eight years earlier she had caught her previous husband (C.'s biological grandfather) "with his hand up underneath [one of his daughter's] shirt." The state moved to preclude the defendant's introduction of this third-party culpability defense. The trial court granted the motion saying, "there's, frankly, no evidence whatsoever that anything inappropriate ever happened between [the third party] and the victim in this case."

¶22 To be admissible, evidence of third-party culpability must "be relevant, meaning it must tend to create reasonable doubt as to the defendant's guilt, and . . . the probative value of the evidence must not be substantially outweighed by the risk that it will cause undue prejudice, confusion of the issues, or delay." *Machado*, 224 Ariz. 343, ¶ 14, 230 P.3d at 1167 (internal citation omitted). Because evidence of third-party culpability is easily fabricated, such evidence tends to raise a reasonable doubt only if it has some measure of reliability. *See State v. Hoskins*, 199 Ariz. 127, ¶ 64, 14 P.3d 997,

1013-14 (2000) (noting self-serving and dubious nature of proffered third-party culpability evidence).

¶23 Churchwell asserts that "by not applying the relevancy test, and instead simply finding the evidence 'too speculative' the trial court abused its discretion." He claims the evidence was relevant because "evidence that someone else, who had been seen fondling a child in the past, had access to [the victim] would have tended to create a reasonable doubt as to Mr. Churchwell's guilt." He, however, fails to acknowledge the trial court did apply the relevancy standard, finding "[p]ursuant to Rule 401, 402, and 403, this type of evidence is just not admissible. It's not relevant." The court found that "[e]ven if [the evidence] w[as] marginally relevant, . . . its probative value is substantially outweighed by the danger of unfair prejudice and . . . confusion of [the] issues."

¶24 Churchwell is correct that evidence of third-party culpability is subject to the same standards of admissibility as other evidence. *See State v. Prion*, 203 Ariz. 157, ¶ 21, 52 P.3d 189, 193 (2002). But a trial court may properly exercise its discretion and "exclude . . . evidence if it offers only a possible ground of suspicion against another." *Id.* ¶ 22. Even when the third-party culpability evidence is relevant, it may be excluded if "'its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury,'" or for other considerations under Rule 403. *See Gibson*, 202 Ariz. 321, ¶ 13, 44 P.3d at 1003, *quoting* Ariz. R. Evid. 403.

¶25 Here, as the state points out, Churchwell was charged with the crime of engaging in oral sexual conduct with C., in his own home. The potential third-party

culpability evidence consisted only of Sue's uncorroborated allegations from twenty-eight years earlier. Since this remote act, even if true, arguably did not "tend to create a reasonable doubt as to the defendant's guilt," we cannot say the trial court abused its discretion in determining the evidence was not relevant. *See id.* ¶ 16. Even to the extent the evidence was relevant, the court did not abuse its discretion in determining the danger of unfair prejudice substantially outweighed the probative value of the evidence under Rule 403. *See id.* ¶ 17. Therefore, the court did not abuse its discretion in granting the state's motion to preclude evidence of third-party culpability.[9]

b. Preclusion of details of conflict between Mollie and Sue

¶26 Churchwell next argues the trial court improperly precluded him from eliciting testimony regarding a dispute between Mollie—C.'s mother—and Sue—Mollie's mother and Churchwell's wife. He asserts here, as he did below, that the dispute showed that Mollie resented Churchwell and therefore had a reason to coach C. to lie. Although evidence the women had a "substantial disagreement . . . such that they would not speak for months at a time" was admitted, the court determined "[t]he specific details of why their relationship is imperfect [were] not relevant . . . [a]nd they [were] more prejudicial than they [were] probative." Churchwell asserts this was an abuse of

[9]Churchwell also argues the trial court erred in denying his motion for a new trial because the exclusion of third-party culpability evidence prevented him from presenting a complete defense. But since we find no error in the court's preclusion of this evidence, we likewise find no error in the court's denial of Churchwell's motion for a new trial on these grounds.

discretion preventing him from a "meaningful opportunity to present a complete defense." We disagree.

¶27 In any question as to the admissibility of evidence, the trial court must first determine whether the evidence is relevant. *State v. Gibson*, 202 Ariz. 321, ¶ 13, 44 P.3d 1001, 1003 (2002). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401. After determining the evidence is relevant it is admissible unless the court finds "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Ariz. R. Evid. 402 and 403. Churchwell claims the details of the dispute were relevant and necessary to explain "why [C.] would be saying Grandpa Will molested her if it wasn't true."

¶28 During cross-examination of Mollie, Churchwell's counsel attempted to elicit details regarding a specific dispute between the two women. The trial court sustained the state's objection on relevance grounds. "While wide latitude should be granted in cross-examination," the court may in its discretion and consistent with the rules of evidence "curtail" the scope of cross-examination. *State v. Zuck*, 134 Ariz. 509, 513, 658 P.2d 162, 166 (1982). In limiting the scope of cross-examination, the court is "entitled to rely upon what the record before it reveals to be the relevancy" of the evidence sought. *See State v. Navarro*, 132 Ariz. 340, 342, 645 P.2d 1254, 1256 (App.

1982) (ruling on relevancy of attempted cross-examination reversed only for clear abuse of discretion and prejudice).

¶29 Churchwell argued to the trial court that the specific details of the conflict between the two women were relevant to show "further animosity between [Mollie] and Sue and her current husband and reason for her to fabricate and reason for her to have coached her child." The court told Churchwell, "I think you have established what you want to establish and why there may be a motive for her to . . . bring these allegations or coach her child to make these allegations." Although the court found the specific details of the dispute to be irrelevant, the jury heard evidence that on more than one occasion Mollie and Sue had "relationship problems . . . to the point where [they did not] talk," that one month before C.'s disclosure the two "had a big fight," and Sue described their relationship as "volatile."

¶30 Under these circumstances, the trial court did not abuse its discretion or prevent Churchwell from asserting a complete defense. *See id*. at 342-43, 645 P.2d at 1256-57 (ruling on relevancy of attempted cross-examination reversed only for clear abuse of discretion and prejudice). Because the court permitted Churchwell to present evidence of animosity between Mollie and Sue, the specific details of the dispute were not necessary.

c. Preclusion of state of mind evidence

¶31 The state presented a recorded telephone call in which Mollie confronted Churchwell about C.'s allegations. At no point during the call did Churchwell

specifically deny the allegations. During Churchwell's trial testimony, his counsel asked him to "describe [his] state of mind . . . when [he] got that phone call." Churchwell provided extensive testimony about his state of mind during the confrontation call, explaining that "[his] mind . . . just exploded" and he felt "overwhelmed." The state did not object to this line of questioning.

¶32 On redirect examination, defense counsel asked "did it ever occur to you that maybe [C.] had been touched by someone and you didn't—" and the state objected. The court sustained the objection and noted, "[t]his is the third-party[-]culpability evidence." Churchwell's counsel argued the question was relevant to Churchwell's state of mind, explaining why he made "strange responses" during the confrontation call and had remained on the phone for an extended period of time. The court found the end result would have been to present evidence "[Churchwell] thinks that somebody else must have done this," and was therefore third-party-culpability evidence.

¶33 Churchwell asserts that the trial court incorrectly characterized the testimony as third-party-culpability evidence. We disagree. Although Churchwell maintains he "did not intend to testify that someone else had in fact molested C.," based on our review of the record the trial court reasonably could have interpreted counsel's question as intending to elicit concrete third-party-culpability evidence that the court previously had precluded.

¶34 Churchwell also argues the exclusion of this evidence "denied [him] the opportunity to fully explain his state of mind at the time . . . and that he was reacting to

the thought that someone else had done something to C." As discussed above, however, evidence of third-party culpability is admissible only if it is relevant and its probative value is not outweighed by the danger of unfair prejudice. *Machado*, 224 Ariz. 343, ¶ 14, 230 P.3d at 1167.

¶35 Even to the extent that Churchwell's supposition was relevant, it was properly excluded as third-party-culpability evidence. It was a self-serving statement that lacked the requisite indicia of trustworthiness and had potential to mislead the jury and confuse the issues. *See Hoskins*, 199 Ariz. 127, ¶ 64, 26 P.3d at 1013-14; *cf. Chambers*, 410 U.S. at 302 (exclusion of trustworthy, critical evidence under state evidentiary rules does not accord with due process). Here, Churchwell testified in detail about his state of mind during the confrontation call. We find no abuse of discretion in the trial court's refusal to permit Churchwell to suggest that C. might have been "touched" by someone else.

IV. Prosecutorial misconduct

¶36 Churchwell next claims the prosecutor "made several improper comments during . . . opening statement and closing argument" which amounted to improper vouching for the victim. He argues the "cumulative effect" of the statements constituted prosecutorial misconduct. Churchwell concedes that because he neither objected to any of the purportedly improper statements nor alleged prosecutorial misconduct at trial, he is limited to fundamental error review on both issues. *See State v. Harrod*, 218 Ariz. 268, ¶ 35, 183 P.3d 519, 529 (2008) (prosecutorial misconduct); *State v. Van Den Berg*, 164

Ariz. 192, 196, 791 P.2d 1075, 1079 (App. 1990) (improper argument). For Churchwell to prevail under the fundamental error standard, he "must establish both that fundamental error exists and that the error . . . caused him prejudice." *State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005).

¶37 Churchwell claims the prosecutor's comments during opening statement that C. had told Marcia and then Mollie "that the defendant had been touching her" were improper because the court had precluded statements by the victim to the women as hearsay. He also challenges the prosecutor's comment on the consistency of C.'s statements in closing argument:

> What other evidence do you have that this offense occurred? You have the consistency in [C.]'s statements. Ladies and gentlemen, I'm sure that defense counsel is going to get up and he's going to argue the contrary. He's going to tell you that [her] statements have not been consistent. But let's talk about the consistency in her statements.

The prosecutor argued C. had told various witnesses "this defendant was touching her." But the prosecutor also noted, "yes, there have been inconsistencies in her statement. But think about the things that she's been inconsistent about . . . ." Churchwell also argues the prosecutor improperly argued the victim "would have no other source of sexual knowledge," knowing that "evidence" of the victim's alleged "previous sexual conduct" was precluded.

¶38 We are not convinced any of the prosecutor's comments were error, let alone fundamental error. The comments that the victim had told Marcia, Mollie, and the forensic investigator that her step-grandfather had "touch[ed] her" were not improper,

notwithstanding Churchwell's argument that any reference to the victim's statements violated the trial court's exclusion of hearsay evidence. The prosecutor's statements were based upon the evidence—C.'s unobjected-to statement that she had told Marcia, Mollie, and the investigator what Grandpa Will had done to her. The prosecutor did not attempt to introduce precluded hearsay statements via closing argument but instead accurately described C.'s trial testimony.

¶39 The prosecutor's comments regarding the victim's consistent statements did not constitute improper vouching. There are two types of improper prosecutorial vouching: "'where the prosecutor places the prestige of the government behind its [evidence],'" and "'where the prosecutor suggests that information not presented to the jury supports the [evidence].'" *State v. Newell*, 212 Ariz. 389, ¶ 62, 132 P.3d 833, 846 (2006), *quoting State v. Vincent*, 159 Ariz. 418, 423, 768 P.2d 150, 155 (1989) (alteration in *Newell*). But "[a]ttorneys, including prosecutors in criminal cases, are given wide latitude in their closing arguments to the jury." *See State v. Comer*, 165 Ariz. 413, 426, 799 P.2d 333, 346 (1990). And, counsel is permitted to "'comment on evidence and argue all reasonable inferences therefrom.'" *State v. Zinsmeyer*, 222 Ariz. 612, ¶ 16, 218 P.3d 1069, 1077 (App. 2009), *quoting State v. Dumaine*, 162 Ariz. 392, 401, 783 P.2d 1184, 1193 (1989). A comment constitutes fundamental error only when it is "so egregious as to deprive the defendant of a fair trial." *Van Den Berg*, 164 Ariz. at 196, 791 P.2d at 1079.

¶40 Rather than vouching, the prosecutor's comments were proper rebuttal to Churchwell's argument the victim was not credible because "[her] version of where people were . . . has changed over time." *See State v. Duzan*, 176 Ariz. 463, 468, 862 P.2d 223, 228 (App. 1993) ("prosecutorial comments which are fair rebuttal to comments made initially by the defense are acceptable"). In both opening statement and closing argument, defense counsel maintained C. was not credible because of inconsistencies in her testimony. Not only were the prosecutor's comments proper rebuttal but, because C. testified in person, the jury could determine for itself her credibility. *See Herrera*, 226 Ariz. 59, ¶ 39, 243 P.3d at 1052-53.

¶41 There was likewise no error in the prosecutor's argument "How would [C.] know about these things and how would she be able to describe them to you if they hadn't really happened to her, if she hadn't truly experienced them?" Churchwell argues this comment was improper because "the prosecutor . . . had requested [evidence] . . . be precluded [which] would support an argument that [C.] did have other sources of sexual knowledge." As discussed above, however, the trial court found that there was no clear and convincing evidence any prior sexual conduct had occurred. Therefore, the prosecutor was merely arguing a reasonable inference drawn from the evidence presented to the jury. *See Zinsmeyer*, 222 Ariz. 612, ¶ 16, 218 P.3d at 1077.

¶42 Churchwell argues that, even if the statements alone did not constitute fundamental error, their cumulative effect amounted to prosecutorial misconduct. Prosecutorial misconduct warrants reversal only if "the prosecutor's misconduct 'so

infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998), *quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Churchwell must establish the prosecutor's comments were improper before he can establish such unfairness and, as discussed above, we discern nothing improper in the prosecutor's comments. *See State v. Lynch*, 225 Ariz. 27, ¶ 65, 234 P.3d 595, 607 (2010) ("'[a]bsent any finding of misconduct, there can be no cumulative effect'"), *quoting State v. Bocharski*, 218 Ariz. 476, ¶ 75, 189 P.3d 403, 419 (2008). Although "several non-errors and harmless errors" can cumulatively amount to prosecutorial misconduct, there can be no cumulative error where none of the challenged comments constituted error. *See Hughes*, 193 Ariz. 72, ¶¶ 25-26, 969 P.2d at 1190-91.

Disposition

¶43 Churchwell's conviction and sentence are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge